IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0255
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
JANE CHRISTINE LONG,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200400692

Honorable James L. Conlogue, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Jessica L. Quickle — Phoenix
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial conducted in her absence, appellant Jane C. Long was convicted of one count each of possession of marijuana weighing less than two pounds, a class six felony; possession of drug paraphernalia, a class six felony; and possession for sale of methamphetamine weighing more than nine grams, a class two felony. Following her subsequent arrest, she was sentenced to concurrent, presumptive terms of imprisonment, the longest being five years.[1] This appeal followed.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the convictions. *See State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). In August 2004, Long was a passenger in a pickup truck passing through a Border Patrol checkpoint when a drug-detection dog alerted on her purse. Border Patrol officers found $3,600 in cash inside the purse. Department of Public Safety officers arriving on the scene observed a very small baggie inside a traffic cone lying on its side within two feet of where Long was seated. The baggie was decorated with purple dolphins and appeared to contain methamphetamine. After her arrest, Long was cooperative and accompanied officers to her Sierra Vista residence.

¶3 A search of Long's bedroom, which was padlocked when she and the officers arrived, revealed several baggies containing a green, leafy substance; three scales, one of which appeared to have methamphetamine residue; two small funnels, one of which also

[1]Long was simultaneously sentenced in another case not on review here. Those additional terms of imprisonment were ordered to be served consecutively to the sentences in this case.

appeared to have methamphetamine residue; numerous tiny, plastic, self-sealing baggies decorated with "black skeleton heads" and "lavender porpoise[s]"; rolling papers; a locked metal cash box; and a loaded handgun. Inside the cash box when it was subsequently opened pursuant to a warrant were more small, decorated baggies of methamphetamine and two baggies apparently containing methamphetamine residue. Later testing established that the total weight of the methamphetamine from both seizures was 27.19 grams, the residue was in fact methamphetamine, and the green, leafy substance was marijuana.

¶4 Long was charged with the drug offenses listed above and with possessing a deadly weapon during the commission of a drug offense. She did not appear for trial, and the jury found her guilty of the drug offenses but acquitted her of the weapons charge.

Voluntary Absence

¶5 Long contends her absences from both the pretrial suppression hearing and the trial were involuntary and therefore require reversal of her convictions. The state responds that the trial court did not err or abuse its discretion in finding Long's absences voluntary. Whether a defendant's absence was voluntary is a question of fact, and we review a trial court's finding of voluntariness for an abuse of discretion. *See State v. Bishop*, 139 Ariz. 567, 569, 679 P.2d 1054, 1056 (1984).

¶6 "The right to be present at critical stages of the proceedings . . . is guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution." *State v. Canion*, 199 Ariz. 227, ¶ 25, 16 P.3d 788, 794 (App. 2000); *see also* Ariz. R. Crim. P. 19.2.

Our supreme court has held a defendant's right to be present at trial applies in any proceeding at which the defendant's presence has a substantial relation to the opportunity to defend against the charge. *See State v. Jones*, 197 Ariz. 290, ¶¶ 50-51, 4 P.3d 345, 363 (2000). However, a defendant can waive that right by voluntarily choosing not to attend a particular proceeding. *See State v. Reed*, 196 Ariz. 37, ¶ 3, 992 P.3d 1132, 1133-34 (App. 1999). Rule 9.1, Ariz. R. Crim. P., permits a court to infer the defendant's absence was voluntary if the defendant was personally informed of the time of the proceeding and the defendant's right to be present and was warned that the proceeding would go forward even in his or her absence. *See State v. Muniz-Caudillo*, 185 Ariz. 261, 262, 914 P.2d 1353, 1354 (App. 1996). "The rule creates an inference and does not require the trial court to make a finding that a defendant has voluntarily absented [herself] before proceeding." *State v. Suniga*, 145 Ariz. 389, 391-92, 701 P.2d 1197, 1199-1200 (App. 1985).

¶7 Long contends her absence was involuntary because she was not informed of the rescheduled date of the suppression hearing until the morning it occurred, when she was "in another town working" and could not attend. At the hearing, Long's counsel noted the fact that the hearing had been rescheduled from May 19 to May 17 "may have some bearing on Ms. Long not being here." The court stated, "[I]n the event that Ms. Long does appear on the 19th, we may need to reconsider the issue, but at this point in time, I do find that her absence is voluntary." Long did not appear until a change-of-plea hearing on May 24, when she alleged she had not been notified of the suppression hearing until the 17th and had been

working "in another town" and physically unable to return to Bisbee in time to attend. Observing that "it was [Long's] obligation to maintain consistent contact with [her] attorney," the court stated Long had been "voluntarily absent at the time of the hearing." The next morning, before trial commenced, Long's counsel told the court: "I advised her of the suppression hearing on Friday, May 13th, that we had a suppression hearing on Tuesday, the 17th. I attempted to call her on Monday."

¶8 The record reflects that, at her arraignment, Long had received and signed an acknowledgment of her right to be present at future proceedings, which also explained the potential consequences of failing to appear. And the trial court implicitly found that Long's failure to maintain contact with her attorney resulted in her absence from the suppression hearing. *See Bishop*, 139 Ariz. at 571, 679 P.2d at 1058 ("An out-of-custody defendant has the responsibility to remain in contact with his attorney and the court."); *State v. Tudgay*, 128 Ariz. 1, 3, 623 P.2d 360, 362 (1981) (same); *Muniz-Caudillo*, 185 Ariz. at 262, 914 P.2d at 1354 (when lack of notice results from failure to maintain contact with counsel, absence may be considered voluntary).

¶9 Although Long's statements conflicted with her counsel's about when she was notified of the suppression hearing, we defer to the trial court's resolution of that conflict. *See Bishop*, 139 Ariz. at 569, 679 P.2d at 1056. We note Long did not request an evidentiary hearing to determine the nature of her absence. *See State v. Sainz*, 186 Ariz. 470, 473, 924 P.2d 474, 477 (App. 1996) ("[W]hen using Rule 9.1, the trial court must, *if asked*, determine

whether the defendant's absence was, in fact, voluntary.") (emphasis added). Moreover, at the suppression hearing, Long's counsel offered no explanation for her absence and had no information to suggest her failure to appear was involuntary. Finally, Long has failed to demonstrate any prejudice resulting from her absence, merely asserting she could have refuted the officers' testimony that she consented to the search of her residence. But she has not supported her assertion with any facts to establish her lack of consent to the search. The defendant bears the "burden of persuasion" in the "fact-intensive inquiry" to determine if she has been prejudiced. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Accordingly, we cannot say the trial court abused its discretion by inferring, pursuant to Rule 9.1, that Long had voluntarily absented herself. *See Muniz-Caudillo*, 185 Ariz. at 262, 914 P.2d at 1354.

¶10 Furthermore, because Long was present at the hearing on May 24 and was personally admonished by the court to attend her trial the next day, she clearly had notice of the May 25 trial date and of her right to be present, and she knew the trial could proceed in her absence. We therefore cannot say the trial court abused its discretion by inferring Long was voluntarily absent from her trial and by proceeding to try her in absentia. *See id.*

Motion to Withdraw

¶11 Long next complains the trial court erred by denying her counsel's motion to withdraw, filed at Long's request the day before trial. She argues the court's denial of the motion to withdraw deprived her of the effective assistance of counsel. However, issues

relating to the effectiveness of counsel must be addressed in post-conviction proceedings pursuant to Rule 32, Ariz. R. Crim. P. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) ("Any such claims [of ineffective assistance of counsel], henceforth, will not be addressed [on appeal] regardless of merit.").

¶12 We review for an abuse of discretion a trial court's decision on a motion to withdraw. *See State v. Tucker*, 205 Ariz. 157, ¶ 23, 68 P.3d 110, 115 (2003); *State v. Sustaita*, 183 Ariz. 240, 241, 902 P.2d 1344, 1345 (App. 1995). The trial court did not abuse its discretion in denying the motion. Rule 6.3(c), Ariz. R. Crim. P., governs the withdrawal of counsel in criminal cases and states:

> No attorney shall be permitted to withdraw after a case has been set for trial except upon motion accompanied by the name and address of another attorney, together with a signed statement by the substituting attorney that he or she is advised of the trial date and will be prepared for trial.

Long's motion was filed the day before trial was scheduled to begin. At the hearing on the motion, Long asserted she had already spoken "about a month ago" with alternate counsel, who had told her to "kind of see what's going on." However, the rule explicitly requires that substitute counsel submit a written statement confirming counsel is aware of the trial date and will be ready to try the case, and Long did not provide such a statement. Thus, the trial court did not abuse its discretion by denying counsel's motion to withdraw. *See Tucker*, 205 Ariz. 157, ¶ 23, 68 P.3d at 115; *Sustaita*, 183 Ariz. at 241, 902 P.2d at 1345.

Inculpatory Statements

¶13 Finally, Long contends the trial court erred by admitting inculpatory statements she had made to law enforcement officers during a subsequent, unrelated arrest.[2] The state argues the statements were properly admitted. We review a trial court's decision to admit evidence for an abuse of discretion. *See State v. Alatorre*, 191 Ariz. 208, ¶ 7, 953 P.2d 1261, 1264 (App. 1998).

¶14 Long's arguments on appeal are based on Rule 404(b), Ariz. R. Evid. Below, however, she claimed the evidence was "inflammatory" and asked the court to conduct a balancing test under Rule 403, Ariz. R. Evid., which the court did. To minimize any prejudice from the statements, the court limited the information presented to the jury about the nature of Long's contact with the officer when the statements were made. After the officer had testified about Long's statements without objection, Long moved for a mistrial, arguing the officer's reference to a "methamphetamine investigation" instead of just an investigation concerned "a whole other act" and was, therefore, "inflammatory." No argument based on Rule 404(b) was presented to the trial court, and the court did not rule on the admissibility of the statements under Rule 404(b).

¶15 Because Long did not object on Rule 404(b) grounds below, she has forfeited appellate relief unless this court finds fundamental error. *See State v. Henderson*, 210 Ariz.

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[2]The statements at issue were: "She said it was not fair. She was just trying to replace her meth taken from her last time. She complained that she could not get ahead if we kept taking her drugs."

561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id., quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). Before we will reverse a conviction based on fundamental error, the defendant must show how the error prejudiced the defense. *Id.* ¶ 20.

¶16 Rule 404(b) limits evidence of "other crimes, wrongs, or acts" except to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The trial court admitted the statements themselves but precluded any mention of Long's resulting arrest or the additional charges brought against her. Instead the court instructed the parties to say that officers had made contact with Long during an investigation "related to methamphetamine." As circumscribed by the trial court, the inculpatory statements were relevant to the charges at issue and did not refer to another bad act. And, in any event, the other act and statements would have been admissible to demonstrate Long's motive, knowledge, or intent or to show an absence of mistake relating to the charge of possessing methamphetamine for sale in this case. *See* Ariz. R. Evid. 404(b). The trial court did not abuse its discretion in admitting this evidence. *See Alatorre*, 191 Ariz. 208, ¶ 7, 953 P.2d at 1264.

¶17 "Before we may engage in a fundamental error analysis, . . . we must first find that the trial court committed some error," *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333,

342 (1991), and Long has not demonstrated any error occurred here. Therefore, following *Lavers*, 168 Ariz. at 385, 814 P.2d at 342, we do not conduct a fundamental error analysis.

Disposition

¶18 Long's convictions and sentences are affirmed.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge